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JAMES R. BROWNING, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 900.

McCORMICK & COMPANY, INCORPORATED,

Plaintiff-Petitioner,

against

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

REPLY BRIEF OF PLAINTIFF-PETITIONER.

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INDEX.

PAGE

POINT I.—Additional reasons specially applicable to judgments of the Court of Claims why the writ should be granted under this Court's supervisory powers 1

A.—The lower Court's misapprehension of the real issue and the insufficiency of its findings to support its conclusions which produced conflict with this Court's decisions and warrants granting of the writ 1

B.—The lower Court's fundamental mistake as to the parties intended by the statute to receive the benefit of the drawback which warrants review by this Court 3

C.—The lower Court's basic misconception of the nature of a drawback which resulted in its illiberal and erroneous construction of the statute and is of general importance warranting review by this Court 4

D.—The lower Court's serious errors of statutory construction which are of general public consequence 7

E.—The lower Court's misstatement of plaintiff's basic theory which calls for the exercise of this Court's power of supervision 11

F.—Existence of important questions though present here is not required for review of Court of Claims' decisions especially where there exists a conflict with this Court's decisions 12

CONCLUSION 14

Table of Cases.

	PAGE
Allen v. *Smith*, 173 U. S. 389, 399	9
Bowers v. *N. Y. & Albany Co.*, 273 U. S. 346	6, 10
Cahn v. *U. S.*, 297 U. S. 691	12
Chatwin v. *U. S.*, 326 U. S. 455, 459	12
Cincinnati Soap Co. v. *U. S.*, 301 U. S. 308, 317	5
Crooks v. *Harrelson*, 282 U. S. 55, 61	6, 10
Dies v. *New York Life Insurance Co.*, (No. 58, May 18, 1959)	12
Downs v. *U. S.*, 113 Fed. 144	7
Downs v. *U. S.*, 187 U. S. 496	6
Edwards v. *Cuba Railroad*, 268 U. S. 628	5
Hoffman Beverage Co. v. *U. S.*, 119 Ct. Claims 803, 71 F. Supp. 147	4, 5
Iowa v. *McFarland*, 110 U. S. 471, 479	5
Kenicott v. *The Supervisors*, 83 U. S. 452, 471	5
Latimer v. *U. S.*, 223 U. S. 501, 503-4	9
MacEvoy v. *U. S.*, 322 U. S. 102, 107	8
Mass & Waldstein Co. v. *U. S.*, 283 U. S. 583	13
McFeely v. *Commissioner*, 296 U. S. 102, 111	10
McGoldrick v. *Compagnie Generale*, 309 U. S. 430, 432	6
Nichols v. *U. S.*, 249 U. S. 34	6
Patton v. *U. S.*, 159 U. S. 500, 509	9
Reynolds v. *U. S.*, 292 U. S. 443	12
Russell v. *Sebastian*, 233 U. S. 195, 205	6
Seeberger v. *Castro*, 153 U. S. 32, 36	8, 9
Spalding v. *Castro*, 153 U. S. 38, 39	9
Standard Vacuum Oil Co. v. *U. S.*, 339 U. S. 157, 160, 161	11

PAGE

U. S. v. *Anderson, Clayton & Co.*, 350 U. S. 55, 57.... 12
U. S. v. *Causby*, 328 U. S. 256, 267..... 3
U. S. v. *Cook*, 257 U. S. 523, 526..... 5
U. S. v. *Merriam*, 263 U. S. 179, 188..... 10
U. S. v. *Olympic Radio & Television*, 349 U. S. 232, 233 12
U. S. v. *Passavant*, 169 U. S. 16, 23, 25..... 5, 6
U. S. v. *Penn Mfg. Co.*, 335 U. S. 857..... 3
U S. v. *Penn Mfg. Co.*, 337 U. S. 198..... 3
U. S. v. *Realty Co.*, 163 U. S. 427, 435, 440..... 5, 6
U. S. v. *Standard Rice Co.*, 323 U. S. 106..... 12
U. S. Walker-Hill Co., 79 F. Supp. 482, 485..... 4

Statutes.

Internal Revenue Code of 1939,
Section 1313 7
Section 2809(b) 4, 7, 8
Section 3124(a)(1) 4, 8
Section 3179 ..... 7, 10
Section 3250(1) 4, 6, 7, 8

Other Authorities.

New International Encyclopedia, Second Edition, Article, "Drawback" 7

"Jurisdiction of The Supreme Court" by Robertson and Kirkham, 1951..... 12, 13

"Supreme Court Practice," by Robert L. Stern and Eugene Gressman, 2nd ed. 1954, p. 116..... 12

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POINT I.

Additional reasons specially applicable to judgments of the Court of Claims why the writ should be granted under this Court's supervisory powers.

A.

The lower Court's misapprehension of the real issue and the insufficiency of its findings to support its conclusions which produced conflict with this Court's decisions and warrants granting of the writ.

The issue here is not what constitutes "distilled spirits" within the statutory definition of Chapter 26. Neither is the issue what is meant in common parlance by "distilled spirits" in the broadest generic sense of these

words apart from statutory definition. Both these exhaust the entire content of "distilled spirits" and include substances which are both commercially unusable and also totally unfit for human consumption.

Within each of these accepted meanings, however, there are various and different types of distilled spirits. The real question, therefore, is what type of distilled spirits is being talked about in the statute in question in this case. Necessarily it cannot be the type of poisonous unmerchantable substance represented by this batch of imported impure ethyl alcohol though for other purposes and in other contexts that poisonous substance might satisfy some one of the broad range of meanings of which the words "distilled spirits" are susceptible. Necessarily, in the context of the particular statute in which the phrase "distilled spirits" is employed here, in the absence of a definition in that statute,* that type of "distilled spirits" is meant whose uses the statute contemplates and with which particular uses the statute deals. The intended statutory uses perform precisely the same office as the statutory definition of distilled spirits as an alcoholic beverage did in the California statute construed by the Court in *American Distilling Co.* v. *State Board of Equalization* (Petition p. 8). Whatever is required to create that type of "distilled spirits" constitutes their production for the statutory purposes.

The lower Court in its Opinion and Findings tacitly recognizes, though it fails overtly to acknowledge, this proposition's irrefutable force. In describing the transformatory treatment to which this poisonous imported substance was domestically subjected the Court was

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* Questions involving this issue may still arise despite the prospective amendment of the statute because the statute, even as amended, still contains no definition of distilled spirits.

forced to use language flatly characterizing that treatment as constituting production (App. Finding 8, p. 29).

Fatal to the Court's conclusion is the fact that it made no finding that the imported poisonous substance had previously been subjected to a distillation process so as to make it distilled spirits even in the statutory sense of Chapter 26. Nor is there any finding of what processes the imported substance had previously undergone.* The Defendant's Brief p. 5 does not assert a previous distillation. The radical nature of the processes to which the substance was, however, domestically subjected is proof that the original treatment—whether by distillation or otherwise—was at best only partial and uncompleted so that no original full distillation resulting in the production of true distilled spirits had ever taken place.

These intensive, transformatory processes which took place here domestically therefore constituted "production" as defined by this Court's decisions cited in the Petition (pp. 4-7). The conflict of the lower Court's opinion with the criteria there laid down is one of the bases on which review by this Court is sought. The Defendant's Brief does not seriously dispute Plaintiff's statement of those criteria but only their application.

B.

The lower Court's fundamental mistake as to the parties intended by the statute to receive the benefit of the drawback which warrants review by this Court.

Defendant's Brief (p. 7) relies on the Court's mistaken statement (Opinion, App. 26) concerning "the statute's

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* This Court granted certiorari to the Court of Claims in *U. S.* v. *Penn Mfg. Co.* 335 U. S. 857 and reversed that Court's decision in *U. S.* v. *Penn Mfg. Co.* 337 U. S. 198 for similar insufficiency of its findings to support its conclusions, and in *U. S.* v. *Causby* 328 U. S. 256, 267 held that a deficiency in that Court's findings could not be rectified by statements in its opinion.

intent to limit drawbacks to domestic producers only". Of course the drawback is not granted to the domestic *producer of the distilled spirits;* it is allowed by the Section's terms to the *manufacturer using distilled spirits in the specified non-beverage products* whose domestic production it is the statute's objective to encourage. (Section 3250(1), App. B and *U. S. Walker-Hill Co.*, 79 F. Supp. 482, 485). This mistake on the Court's part is so fundamental and was so fatal to its proper comprehension and construction of the statute, as of itself alone to require review by this Court under its supervisory powers.

Problems concerning the party eligible for the drawback have arisen in the past (*Hoffman Beverage Co.* v. *U. S.*, 119 Court of Claims 803, 71 F. Supp. 147) and will arise despite the prospective amendment of the statute in the future. A correct determination of that issue is therefore important to the administration of the statute.

C.

The lower Court's basic misconception of the nature of a drawback which resulted in its illiberal and erroneous construction of the statute and is of general importance warranting review by this Court.

"In the instant case", said the Court, "*merit can be found in both parties' definition of the word 'produced'.* However, *bearing in mind the nature of a drawback* we reach the conclusion contended for by the defendant primarily on the definitions of distilled spirits found in Section 2809(b) (1), quoted *supra*, and the definition of alcohol in Section 3124(a) (1) * * *". (App. 24) (emphasis added). The Court's understanding of the nature of a drawback is derived from a District Court's decision (cited Opinion App. 24) characterizing a drawback as "a governmental grant of a privilege and benefit" * * * "to

be construed in favor of the government and against the party claiming the grant". The cited case is at variance with this Court's decisions interpreting the various drawback statutes set forth in the Petition (pp. 4-6) which impose no such strict canon of construction and with the decisions of this Court hereafter discussed. The lower Court's rule of construction here is also at variance with its own decision in *Hoffman Beverage Co.* v. *U. S.* 119 Ct. of Claims 803, 71 F. Supp. 147, in which it held that this same drawback statute should be construed in favor of "all those who came within its equity" (151) and (152) denied a "narrow construction" that would result in purposeless discrimination.

The lower Court, *though expressly conceding the merit of Petitioner's construction of the statute,* was misled into giving to the statute here—condemned by the legislature as itself arbitrary and discriminatory—the still further strict construction which it did by a misconception of the nature of a drawback so fundamental as in itself to warrant review by this Court. A drawback whether denominated as a bounty or a bonus, is not, as the lower Court's opinion holds, a mere legislative gratuity or act of grace; *Kenicott* v. *The Supervisors,* 83 U. S. 452, 471; *Iowa* v. *McFarland,* 110 U. S. 471, 479; *U. S.* v. *Realty Co.,* 163 U. S. 427, 435, 440; *U. S.* v. *Cook,* 257 U. S. 523, 526; *Edwards* v. *Cuba Railroad,* 268 U. S. 628, 632; *Cincinnati Soap Co.* v. *U. S.,* 301 U. S. 308, 317. The object of a drawback is to encourage certain types of manufacture or production regarded by the legislature as important to the general economy. *U. S.* v. *Passavant,** 169 U. S. 16, 23, 24,

* In that case this Court, speaking through Chief Justice Fuller, said, in equating the concept of "bonification of tax" with that of a drawback, "It is a special advantage extended by government in aid of manufacture and trade, having the same effect as a bonus or

25; *Downs* v. *U. S.*, 187 U. S. 496; *Nichols* v. *U. S.*, 249 U. S. 34. Drawbacks are intended as a stimulus and legislative reward inducing specific action thought to be socially beneficial. By the same token Courts should and do protect action taken in good faith reliance on the statutory reward. *U. S.* v. *Realty Co.*, 437, *supra.* As in the case of similar legislative grants, courts may not deny the statute "a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey"; *Russell* v. *Sebastian*, 233 U. S. 195, 205 especially where, as here, the grant flows not from the solicitation of the grantee but from the government's own motion. The public and the private manufacturer both have interests in seeing that the legislative purpose is accomplished, which this Court should uphold against a decision of a court of first instance frustrating that purpose. "The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the tax payers"; *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 350; *Crooks* v. *Harrelson*, 282 U. S. 55, 61.

The statement in the lower Court's opinion (App. 24) that "Section 3250(1) is not a provision relating to a refund of tax assessed and collected by the Government" would seem further to be in conflict with this Court's decision in *U. S.* v. *Passavant, supra*, p. 23 and with that of the Fourth Circuit Court of Appeals in *Downs* v. *U. S.*, 113 Fed. 144, p. 148, affirmed by this Court in *Downs* v. *U. S., supra*, and see *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430,

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drawback. To use one of the definitions of drawback, it is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed" (p. 23). There are, of course, many other kinds of drawback. This Court's opinions in this case and in the *Downs* and *Nichols cases, supra*, appear to emphasize the compensatory nature of the grant as a spur to industry or commerce.

432 characterizing the export drawback on oil under 19 U. S. C. Section 1313 as "a refund or drawback".

At all events drawbacks are important and of widespread occurrence* with an historic background of absorbing interest.** Their nature and function are deserving of precise definition by this Court if such a definition is not already supplied with sufficient clarity by this Court's previous decisions.

Settlement of the nature of a drawback and of the rules of construction applicable thereto remains essential under the statute in its amended as well as in its present form and also for the purposes of the export drawback on distilled spirits under Section 3179, 26 U. S. C. Internal Revenue Code of 1939 as amended.

D.

The lower Court's serious errors of statutory construction which are of general public consequence.

The lower Court was thus driven by its misconception of the function and nature of a drawback to place its decision, by a strict and erroneous construction of the statute, on plainly untenable grounds. Its decision was predicated squarely on the definition (quoted Opinion p. 24) of distilled spirits contained in Section 2809(b)(1) of a different statute, Chapter 26 of the Internal Revenue Act of 1939, and on its application of that definition, by an inept process of translation, to Section 3250(1) of Chapter 27. For the reasons advanced in the Petition the provisions of Section 3250(1) of Chapter 27 are neither ambiguous nor is

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* See The New International Encyclopedia, Second Edition, Article, "Drawback", and Index to U. S. C. "Drawbacks" listing drawback statutes applying to an enormous range of manufactured articles principally for export.

** See opinion in *Downs* v. *U. S.*, 113 Fed. 144 (4th Cir.), affd. by this Court, 187 U. S. 496.

Chapter 26 to which the Court below resorted in *pari materia*. See specifically the decision of this Court in *Seeberger* v. *Castro*, 153 U. S. 32, 36. In fact the Government in its brief below conceded that the language of the Section is plain and unambiguous (Defendant's Brief in Court of Claims p. 22). For both these reasons resort to such definition is therefore illegitimate.

In addition to these errors of statutory construction the definition on which the Opinion relies* is by its express terms limited to Chapter 26, the statute in which it is found—"*within the true intent and meaning of this chapter*". Emphasis added. (Section 2809(b)(1) quoted at p. 24 of the Opinion.)

The definition, further, on which the Court relied is contained in Chapter 26 which is a general statute. Chapter 27 in which the applicable Section 3250(1) is found is, on the other hand, a special statute limited to specific, narrowly restricted uses of distilled spirits and dealing with its special subject matter in a more detailed way. Under well recognized rules of statutory construction the provisions of such a general act are under such circumstances not controlling in interpreting those of such a special act. *MacEvoy* v. *U. S.*, 322 U. S. 102, 107. Such is particularly the case where, as here, other parts of the special statute (in contrast with the part in which the section here in question is contained) embody specific provisions reading into such other parts the provisions of the general taxing statutes (Petition p. 11).

Further, what is in fact a mere definition of a particular material thing contained in, and expressly restricted

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* The other definition on which the Court relied, Section 3124 (a)(1), quoted on the same page of its Opinion, is merely tautological and refers one back to the previous definition which is expressly limited to Chapter 26.

to, a different and a general statute is surreptitiously employed by the decision below to interpret the meaning in another and a special statute, not only of the thing itself, but of an operation performed upon it, i.e., production of that thing. This error is the more fatal because neither statute contains any definition of production; nor do the Regulations.

Since the undisputed testimony was (Tr. 70, 71, 102) that the imported material had no commercial use except as feed stock for the production of ethyl alcohol, it was raw, unmanufactured material within the express criteria laid down by this Court in *Seeberger* v. *Castro*, 153 U. S. 32, 35, until it was subjected to the domestic processes of production here. There this Court held that imported material not fit for use in the condition imported was unmanufactured material; that the meaning of that word, which is synonymous with "produced" (*Allen* v. *Smith*, 173 U. S. 389, 399), was "a thing made which is useful for its own sake and vendable as such", and that "To speak of it as 'partly manufactured' and deduce a contention therefrom, is simply to assume the question at issue", p. 36. With the principle of this Court's decision in that case (followed by this Court in *Spalding* v. *Castro*, 153 U. S. 38, 39; *Patton* v. *U. S.*, 159 U. S. 500, 509; *Latimer* v. *U. S.*, 223 U. S. 501, 503-4), the decision of the Court below is in direct conflict. The *Seeberger* case and the decisions of this Court cited in the Petition (4-7) specifically refute the Defendant's assertion in its Br. (p. 6) that it is error to "assume" "that a process applied to an article to adapt it to a particular use constitutes 'production' ". Production requires that the article must be "*useful* for its *own sake* and *vendable as such*" (*Seeberger* v. *Castro*, 35, *supra*). The distilled spirits, here domestically produced, possessed this property; the imported, impure, poisonous substance, fit *only* for feed

stock *for production of ethyl alcohol* (Tr. 70, 71, 102), did not. That there may have been one transformation (Defendant's Brief 5) does not preclude another from constituting new production (decisions of this Court, cited Petition pp. 4-6). It is conflict with the *principles, not the specific facts,* involved in those decisions which furnishes ground for certiorari.

Finally the Court below refused to give the words distilled spirits the meaning which their context in Chapter 27 impelled, failed to accord the word "produced" the meaning due it under the rule of this Court's decision in *Western Union* v. *Lenroot.* (Petition, p. 4) and which the prior decisions of this Court (Petition, pp. 4-6) have established, and violated the established rule that a taxing statute is to be strictly construed against the Government (*Bowers* and *Crooks* cases, *supra*). Where a taxing statute is susceptible, as the lower Court conceded here, of two constructions, that construction must be adopted which is most favorable to the tax payer. *McFeely* v. *Commissioner,* 296 U. S. 102, 111; *U. S.* v. *Merriam,* 263 U. S. 179, 188.

Regarded as a precedent, the lower Court's decision, at variance with the Commissioner's in the same case, represents a subtle erosion breaking down fundamental rules of statutory construction of general public consequence beyond the particular injury it inflicts on the Petitioner. It introduces confusion regarding the meaning of domestically "produced" not alone under the present statute but with respect to the meaning of that same word concerning export drawbacks on distilled spirits under Section 3179, 26 U. S. C., Internal Revenue Code of 1939 as amended.

E.

The lower Court's misstatement of plaintiff's basic theory which calls for the exercise of this Court's power of supervision.

The Court's opinion below contains the following suppositious statement:* "A *slight* amount of poisonous or noxious material could be induced into *pure* ethyl alcohol prior to importation which would only require a *simple* distillation process to remove. *Under plaintiff's basic theory,* the process of removing the undesirable material would be a production and a drawback would be allowable". (Opinion, App. 25) (emphasis added) This statement is wrong as well as uncalled for because the Court found that the imported substance was not "pure"; that the amounts of the poisonous substance, methanol, were not "slight" but "excessive"; and that the additional distillation process, which supplemented the chemical process, removing the poisonous substance and impurities was not "simple" but "unusually complicated in nature" (Finding 7, App. 28, 29). Thus the Court has made a fundamental misstatement of Petitioner's basic theory. By so doing and by the implications of its other statements in its Opinion (at Appendix p. 25-26) the lower Court has furnished further ground for allowance of the writ because it "has so far departed from the accepted and usual course of judicial proceedings" "as to call for the exercise of this Court's power of supervision" under the express terms of Rule 19 which includes these considerations among those governing review on certiorari.

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* It thus seems to have considered facts not in the record, warranting reversal under *Standard Vacuum Oil Co.* v. *U. S.* 339 U. S. 157, 160, 161.

F.

Existence of important questions, though present here, is not required for review of Court of Claims' decisions, especially where there exists a conflict with this Court's decisions.

This Court observes in the case of judgments of the Court of Claims a special and more liberal rule for review by certiorari. Where a decision of the Court of Claims is in conflict with that of a Court of Appeals, this in itself has been traditionally sufficient ground for certiorari irrespective of the importance of the question involved. *Cahn* v. *U. S.*, 297 U. S. 691. (See statement of this case, *Robertson and Kirkham*, "Jurisdiction of the Supreme Court of the United States", 1951, p. 721, footnote 1. Compare this Court's thirteen decisions cited in footnote 2, loc. cit. granting certiorari on the basis of conflict alone, and see *U. S.* v. *Olympic Radio & Television*, 349 U. S. 232, 233 and *U. S.* v. *Anderson, Clayton & Co.*, 350 U. S. 55, 57). Such, a fortiori, must also be the case where as here the decision sought to be reviewed is in conflict with this Court's own decisions. In *U. S.* v. *Standard Rice Co.*, 323 U. S. 106, 108, this Court granted certiorari to review a Court of Claims' decision for just such ground, namely conflict with this Court's decision in another case. This Court granted certiorari in *Reynolds* v. *U. S.*, 292 U. S. 443 to correct patent errors of the Court of Claims comparable to those committed by it in this case; and recently in *Dies* v. *New York Life Insurance Co.* (No. 58, May 18, 1959, not yet officially reported) to review similar errors by a Circuit Court of Appeals. Certiorari is also granted because of this Court's doubts as to correctness of the decision below. *Chatwin* v. *U. S.*, 326 U. S. 455, 459.

See also "Supreme Court Practice," by Robert L. Stern and Eugene Gressman, 2nd ed. 1954, p. 116 and

Supreme Court decisions cited. At pp. 137-138 it is stated with regard to review by this Court of the Court of Claims' decisions that "The issues arising in this type of litigation frequently have a unique importance which warrants review by the Supreme Court, inasmuch as so many of the legal responsibilities of the Government are determined solely in the Court of Claims. The possibility of conflict with decisions of other courts is minimized and the decisions of the Court of Claims alone would often settle the law in the absence of Supreme Court review. Certain issues thus acquire an importance justifying review, an importance which they would not otherwise have in the context of private litigation".* The Court of Claims, a court of first instance, would otherwise be automatically converted into a court also of last resort whose decisions would not be subjected to review.

It has also been the practice of this Court to grant the writ where the Government though maintaining the correctness of the result, believes that the reasoning of the Court of Claims cannot be sustained and is likely to introduce confusion into the law. *Robertson and Kirkham, supra,* pp. 722-723 and footnote 4, citing *Mass & Waldstein Co.* v. *U. S.* 283 U. S. 583. A fortiori, the writ should be granted where, regardless of the Government's belief, the decision is, as here, in fact wrong because in conflict with the principles of this Court's decisions and in fact likely to introduce confusion in the law.

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* With regard to decisions of a Court of Appeals, it is there stated (p. 114) that where such a decision "clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari."

Conclusion.

Because of all these errors committed by the lower Court and for these additional reasons, as well as for those presented in the Petition, it is submitted that, in order to prevent a gross miscarriage of justice, the Petition for a Writ of Certiorari should be granted.

Dated June 9, 1959.

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